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No. 98-1323

IN THE

Supreme Court of the United States

October Term, 1998

**PNEUMO ABEX CORPORATION,
PA HOLDINGS CORPORATION,
and THE HENLEY GROUP INC.**

Petitioners,

v.

WILLIAM F. GRUN,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITIONERS' REPLY BRIEF

William R. Sullivan, Jr.
FRANCZEK SULLIVAN P.C.
300 South Wacker Drive
Suite 3400
Chicago, Illinois 60606
(312) 786-6120

Jerold S. Solovy
Counsel of Record
Barry Levenstam
C. John Koch
Jeffrey T. Shaw
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

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PETITIONERS' REPLY BRIEF

Respondent tries to ignore that the docket control issue at the heart of the Seventh Circuit decision here raises significant questions. Respondent also tries to ignore the important issue of appellate jurisdiction raised by petitioners. Thus, respondent contends that the decision below does not warrant this Court's attention because the decision supposedly is in accordance with prior Seventh Circuit authority, consistent in principle with the decisions of other circuits, and too fact-bound and unusual in any event to warrant further review. In fact, however, none of

respondent's contentions counsels against the grant of certiorari.

1. Respondent's Contentions Do Not Overcome The Substantial Importance Of The Docket-Control Question Presented By The Petition.

This case poses an important question concerning the authority of the district courts to control their dockets and to deal with dilatory litigants. Respondent does not address the certworthiness of this issue; instead, he begins by defending his dilatory conduct on the merits. In doing so, respondent cites to a purported five-part "dilatoriness" test set forth in *Ball v. City of Chicago*, 2 F.3d 752 (7th Cir. 1993), and concludes that *Ball* supports the result below. Resp. Opp. 7-11.

Whether respondent's conduct is excused under *Ball* is irrelevant to the question whether the decision below warrants Supreme Court review. The answer to that question is "yes" because the Seventh Circuit reversed the district court's dismissal of a case for a plaintiff's total failure to monitor the litigation for almost six months after the court entered the final pre-trial order in April 1993, *and* for plaintiff's virtual inactivity for *three additional years* following the September 1993 dismissal order (Pet. App. 24a, 26a, 27a). No special circumstances attended this neglect: plaintiff had two sets of counsel during the entire 3½-year period, and neither plaintiff nor his counsel were incapacitated during that period. In short, the court of appeals held as a broad principle that district courts cannot dismiss cases for unexplained failures by plaintiffs to prosecute. It is beyond debate that this ruling strikes a serious blow to the ability of district courts to administer justice

efficiently, and for that reason, Supreme Court review is appropriate.

Respondent next contends that the decision below is consistent with the case law of other circuits, which generally holds that dismissals for want of prosecution are "harsh" sanctions reserved only for "extreme" cases. Resp. Opp. 11-12. But there is no question, as the uncontroverted record establishes, that the situation here is "extreme." Despite the fact that the median interval between the filing and disposition of cases in the district courts of the Seventh Circuit is six months, respondent did nothing in the 5½-month period between the time this case was ready for trial and the dismissal order, and did virtually nothing else for an additional three years. If that is not an "extreme" situation under the circuit authority cited by respondent, then review by this Court is all the more warranted, so that the Court can clarify for *all* courts of appeals that the district courts' docket-control authority does indeed include the power to take decisive action in circumstances such as those at bar.

Respondent lastly contends, with respect to the first question presented, that Supreme Court review is unnecessary because the circumstances of respondent's dilatory conduct are case-specific. Resp. Opp. 13. Contrary to that suggestion, however, there is nothing unusual about the situation here. At issue is a plaintiff's sustained period of inaction, pure and simple, not a complicated constellation of acts that would render this case different from all others.

Furthermore, the Seventh Circuit's approach to this case was to paint with a very broad brush. Among other things, the court of appeals held as a general principle that once litigants

have indicated their readiness for trial, they have no duty to actively advance their own lawsuits—indeed, no obligation whatsoever to take further action until they happen to receive notice from the district court. Pet. App. 26a. Such sweeping pronouncements remove the obligation from plaintiffs to prosecute their cases, improperly place the onus on the court system, and thereby seriously impair the efforts of the federal district courts justly and expeditiously to resolve cases. In light of the general adverse effects on the docket-control powers of the district courts that the Seventh Circuit decision inevitably will have, Supreme Court review plainly is warranted.

2. Respondent Avoids The Important Jurisdictional Question Presented By The Petition.

This case also presents an important question concerning the jurisdictional limitations on federal appellate courts when they address appeals from denials of Rule 60(b) motions. Instead of addressing that question, respondent focuses on the alternative Rule 41(b) dismissal by the district court, and ignores that the court of appeals addressed the question of its jurisdiction squarely under Rule 60(b). Pet. App. 19a & n.8. Utilizing the alternative Rule 41(b) holding, respondent contends that this case falls comfortably within the settled rule that an appeal from a final judgment brings up all interlocutory rulings for review. Resp. Opp. 14-15. But respondent ignores that the *only* reason he had any basis for taking an appeal in the first place was because he had filed a Rule 60(b) motion. There is no authority for the "tail wagging the dog" theory of jurisdiction advanced by respondent—that is, that an appeal from the denial of a Rule 60(b) motion can magically be transformed into a plenary appellate proceeding if the district

judge takes the extra step of entering an alternative default ruling.

In a footnote in *Browder v. Director, Dep't of Corrections*, this Court stated in dicta that an appeal from the denial of a Rule 60(b) motion "does not bring up the underlying judgment for review." *See* 434 U.S. 257, 263 n.7 (1978). Consistent with that dicta, several courts of appeals have squarely held that appellate review of a Rule 60(b) determination cannot reach the merits of the underlying judgment. *See, e.g.*, *FCC v. McNulty*, 137 F.3d 732, 741 (2d Cir.), *cert. denied*, 119 S. Ct. 340 (1998); *Rankin v. Heckler*, 761 F.2d 936, 942 (3d Cir. 1984); *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992); *Lepkowski v. United States Dep't of Treasury*, 804 F.2d 1310, 1312 n.2 (D.C. Cir. 1986). Despite respondent's attempt to create irrelevant peculiarities in the procedural context at bar, this case squarely presents this Court with the opportunity to address the conflict created by the decision below and confirm that the dicta in *Browder*—rather than the Seventh Circuit's decision—accurately sets forth the jurisdictional limits that the federal courts of appeals must obey.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

William R. Sullivan, Jr.
FRANCZEK SULLIVAN P.C.
300 South Wacker Drive
Suite 3400
Chicago, Illinois 60606
(312) 786-6120

Jerold S. Solovy
Counsel of Record
Barry Levenstam
C. John Koch
Jeffrey T. Shaw
JENNER & BLOCK
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Chicago, Illinois 60611
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Counsel for Petitioners

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